Nos. 21,296 and 22,183

United States Court of Appeals

For the Ninth Circuit

ANNA L. SANCHEZ,
Appellant,

vs.

KANO KAWAMURA,
Japanese Consulate, et al.,
Appellee.

BRIEF FOR APPELLEE

SEDGWICK, DETERT, MORAN & ARNOLD,
By F. BEACH KUHL,
111 Pine Street,
San Francisco, California 94111,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Nos. 21,296 and 22,183

United States Court of Appeals

For the Ninth Circuit

ANNA L. SANCHEZ,
Appellant,

vs.

KANO KAWAMURA,
Japanese Consulate, et al.,
Appellee.

BRIEF FOR APPELLEE

STATEMENT OF FACTS

On November 26, 1965, plaintiff filed a complaint in the United States District Court, seeking damages for personal injuries. She alleged that Kano Kawamura, a vice-consul of Japan, so negligently operated a motor vehicle owned by himself, the Japanese Consulate and certain Doe defendants, bearing license No. Consular Corps 193, that it struck and injured plaintiff on September 1, 1964 in the City and County of San Francisco. Appellee moved for a dismissal of the action on the ground that it was barred because it was not filed within one year after the accrual of the cause of action. On July 5, 1966 the District Court granted the motion and on July 26, 1966 judgment of dismissal was entered. On July 19, 1966 appellant filed

her Notice of Appeal from the Order Granting Motion to Dismiss. The record on that appeal (No. 21296) was duly prepared and filed with this court on August 24, 1966. The appeal was docketed on September 23, 1966.

On March 28, 1967, appellant filed in the District Court her Notice of Motion for Order Vacating Judgment of Dismissal. On May 2, 1967, the District Court denied the motion to vacate the dismissal. Appeal No. 22183 was taken from that Order.

QUESTIONS PRESENTED

The question raised in appeal No. 21296 is whether California's one year statute of limitations applies to an action for personal injuries suffered in California which is brought against a vice-consul of a foreign country in federal district court.

The question raised in appeal No. 22183 is whether the district court abused its discretion in denying appellant's motion to vacate the dismissal.

SUMMARY OF ARGUMENT

The reasons why the California one year statute of limitations applies to this case were set out in appellee's brief filed in appeal No. 21296, and the court's attention is respectfully directed to that brief.

In appeal No. 22183 appellant contends that her Motion to Vacate Judgment of Dismissal should have

been granted. A motion for such relief under Rule 60(b) is addressed to the court's discretion, and will not be reversed unless the record shows an abuse of discretion. The end of providing expeditious and conclusive terminations of litigation should not be set aside for a litigant who first chooses to appeal a judgment and later, after long delay and without offering any reason therefor, seeks to have that judgment vacated. Appellant failed to present any facts in support of her motion to justify granting the relief sought. Consequently, there was no abuse of discretion and the motion was properly denied.

The record shows no facts other than the filing, more than a year after the cause of action accrued, of a personal injury lawsuit.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO VACATE THE DISMISSAL.

A. A Motion Under Rule 60(b) Is Addressed to the Discretion of the Court.

The determination of whether to grant or deny a motion for relief under Rule 60(b) involves a discretionary appraisal of the facts of the particular case.

7 *Moore's Federal Practice,* §60.19;

Assman v. Fleming (CCA 8th, 1947) 159 F.2d 332;

Ledwith v. Storkan (D. Neb. 1942) 6 F.R. Serv. 606.24, Case 2, 2 F.R.D. 539.

Such discretionary action will not be lightly interfered with by an appellate court.

Nederlandsche Handel-Maatschappij N. V. v. Jay Emm, Inc. (CA 2d 1962) 301 F.2d 114.

Appellant concedes that the trial court's ruling on such a motion should be reversed only on a showing of abuse of discretion.

Appellant's Opening Brief (appeal No. 21296), Page 4.

B. The Record Shows That There Was No Abuse of Discretion by the District Court.

A review of the record shows that the original order granting dismissal was filed on July 5, 1966. Appellant chose to stand on her claim that some longer period than the one-year statute of limitations applied to her bare personal injury complaint. She took an appeal from the order of dismissal on the record as it stood, rather than seeking leave to file an amended complaint. She filed her notice of appeal on July 19, 1966, the record on appeal was filed and the matter docketed in this court.

Some nine months later, appellant or her counsel had second thoughts about the choice they had made. They decided that a different strategy should have been followed. A notice of motion to vacate the dismissal was thus filed on March 28, 1967.

Rule 60(b) is not intended to provide a litigant relief from his or her own considered, deliberate choice of the manner in which to proceed when hindsight

suggests that the choice originally made may not have been a wise one.

Ackermann v. United States (1950) 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207.

The record does not clearly indicate which of the several grounds for relief appellant intended to urge. The "Statement of Reasons and Memorandum of Points and Authorities" mentions mistake or inadvertence and newly discovered evidence. Clerk's Transcript in appeal No. 22183, Page 4. However, no showing of any facts to support any grounds for relief was made. To the contrary, the affidavit of Victor J. Van Bourg shows that appellee's status as a vice-consul was known to appellant before she ever filed her original complaint in the District Court (and in fact that complaint itself alleges that appellee was a vice-consul.) No facts showing any mistake, inadvertence or newly discovered evidence were presented to the court in support of the motion.

Subdivision (6) of Rule 60(b) allows granting of relief for "any other reason justifying relief." As commentators have pointed out, there must be some showing of *justification* for the relief.

7 *Moore's Federal Practice* 295.

Appellant made no showing to justify such relief. Absolutely no reason was offered for the failure to seek leave to file an amended complaint when the original order of dismissal was made. Nor was any justification offered for delaying nine months, or any evidence presented of anything which had occurred during that period which justified relief. If anything,

it would appear that *granting* the motion to vacate would have been an abuse of discretion.

Without some showing of justification, the District Court had no choice but to deny the motion to vacate the judgment. Appellant contends that *denial* of that motion was an abuse of discretion; quite the contrary, in the absence of any showing, *granting* the motion would have been an abuse of the court's discretion.

The conclusion seems inescapable that, in the absence of any showing of reasons why only a bare negligence complaint was initially filed, and nothing was done to amend the complaint until nine months after the first of the two present appeals was taken, the District Court's ruling was within its discretion, and in fact was the only ruling justified by the record.

II. POLICIES FAVORING ORDERLY ADMINISTRATION OF JUSTICE SUPPORT THE DENIAL OF BOTH OF PLAINTIFF'S APPEALS.

The policies behind finality of judgment and expeditious decision of controversies require that judgments not be set aside except for good reason.

In order for justice to be administered in an orderly fashion, litigation must terminate at some reasonable time. If courts are to perform their function of settlement of private disputes, then their judgments must be conclusive of the matters submitted to them for decision.

Southern Pacific R.R. Co. v. United States (1897) 168 U.S. 1, 18 S.Ct. 18, 42 L.Ed. 355.

Perhaps as necessary as providing *conclusive* disposition of private disagreements by finality of judgments is the providing of *expeditious* disposition of such disputes by efficient administration of justice.

Neither of these goals should be permitted to stand in the way of justice; on the other hand, the benefits arising from finality and expeditiousness should not be undermined by permitting a litigant who has chosen to take an appeal from a judgment to reopen the judgment while the appeal is still pending long after its entry without showing a good reason for doing so.

III. NO BASIS IS DEMONSTRATED FOR TOLLING THE APPLICABLE CALIFORNIA STATUTE OF LIMITATIONS.

Appellant, in both her Opening Brief in appeal No. 21296 and in her Opening Brief on Consolidated Appeals, contends that the record justified tolling the one year statute of limitations. But no facts justifying such tolling appear from the record. It is uncontroverted that appellant filed her complaint more than one year after the accident. She now says, that the complaint was "ineptly pleaded." Appellant's Opening Brief (appeal No. 21296), Page 5. Following this dismissal, she chose to stand on that complaint, and on her contention that some limitation other than one year applied to the case and took the first of these two appeals on that basis.

Nine months later, without offering any reason for not having pleaded additional facts in her original

complaint or for not having sought leave to amend it, she sought leave to have the dismissal vacated. The motion was denied and appellant took the second of these appeals.

The record brought by appellant before this court is simply one of an action for personal injuries filed more than one year after the cause of action accrued.

As such, in the interests of orderly operation of the judicial system, at both the trial and appellate levels, the two appeals should be rejected.

Dated, San Francisco, California,
January 5, 1968.

SEDGWICK, DETERT, MORAN & ARNOLD,
By P. BEACH KUHL,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

P. BEACH KUHL,
Attorney for Appellee.